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No. 01-1225

In the Supreme Court of the United States

MEXICAN AMERICAN LEGISLATIVE CAUCUS-TEXAS HOUSE OF REPRESENTATIVES,
Appellant,

v.

STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas, Tyler Division

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether Appellant's §2 challenges should be dismissed because those challenges (1) were not properly before the three-judge court, and (2) attack the wrong redistricting plan.

2. Whether the judgment should be summarily affirmed because, in accordance with *Upham v. Seamon*, 456 U.S. 37 (1982), the three-judge court properly adopted a plan that used the unobjected-to portion of the State's plan as the baseline and narrowly remediated the Department of Justice's §5 retrogression concerns.

3. Whether the three-judge court's per curiam opinion—which adequately states the factual and legal bases for the court's judgment—violates Federal Rule of Civil Procedure 52(a).

LIST OF PARTIES

Although Appellant properly lists Henry Cuellar, in his capacity as Texas Secretary of State, as a party to the action below, he is not a party to this appeal because the current Texas Secretary of State is Gwyn Shea.

Former Texas Secretary of State Cuellar was originally named in his official capacity as a defendant below, but he resigned from office in late 2001. Geoffrey S. Connor then served as Acting Secretary of State, and he automatically substituted for Secretary Cuellar in the proceeding below. FED. R. CIV. P. 25(d)(1). For this appeal, however, the current Secretary of State, Gwyn Shea, is automatically substituted, in her official capacity, in place of Acting Secretary Connor. SUP. CT. R. 35.3.

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MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 18.6, the State of Texas, Texas Governor Rick Perry, and Texas Secretary of State Gwyn Shea (collectively "the State") move to dismiss this appeal to the extent it raises §2 issues that were not properly before the three-judge court and, otherwise, to affirm the judgment on the ground that the questions presented are so insubstantial as not to require further argument. SUP. CT. R. 18.6.

STATEMENT OF THE CASE

The State directs the Court to the statement of proceedings set forth in the three-judge court's opinion, which is a fair recitation of the proceedings leading up to this appeal. J.S. App., at 3-6.[1]

1. Appellant's Jurisdictional Statement will be cited as "J.S."

ARGUMENT

I. THE COURT SHOULD DISMISS THE PORTION OF THIS APPEAL RAISING §2 CHALLENGES.

A. Appellant's §2 Issues Were Not Properly Before the Three-Judge Court.

Appellant's §2 challenge to the Legislative Redistricting Board (LRB)[2] redistricting plan for the Texas House of Representatives was not properly before the three-judge court because the plan never went into effect and, therefore, was not subject to challenge. As a matter of law, a legislative plan is not effective until it is precleared; therefore, any court ruling on a §2 challenge to an unprecleared plan would be an advisory opinion. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) ("A new reapportionment plan . . . will not be considered 'effective as law' . . . until it has been submitted and has received preclearance under §5. . . . [U]ntil clearance has been obtained, a court [should not] address the constitutionality of the new measure."); *Connor v. Waller*, 421 U.S. 656 (1975) (because an act is not effective until it is precleared, the district court erred in deciding constitutional challenges based on claims of racial discrimination).

Since the LRB plan was not precleared, Appellant's §2 issues challenging the LRB plan were never before the district court, *see* J.S., at 11-13, and these issues, therefore, are not before this Court.[3]

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2. The LRB has a constitutional duty to reapportion seats in the Texas House of Representatives and Texas Senate, but not U.S. Congress, after a decennial census if the Texas Legislature fails to do so. TEX. CONST. art. III, §28. The LRB passed a House plan, Plan 1289-H, as well as a Texas Senate plan, Plan 1188-S, and both were sent to the Department of Justice for preclearance.

3. A three-judge court's role, in the face of a DOJ objection, is to remediate the objected-to plan only to the extent required by federal law.

The three-judge court carefully structured the redistricting litigation—which consisted of congressional, Texas Senate, and Texas House of Representatives trials—to avoid considering any unprecleared, and thus ineffective, plans.[4] Accordingly, the court tried the cases in the order most likely to avoid consideration of a plan that was subject to preclearance requirements but had not yet completed the process of DOJ's §5 review.

The court first tried the congressional case, since the State failed to pass a congressional plan and, therefore, there was no pending §5 review. The court next heard challenges to the LRB's Texas Senate plan, which was precleared three weeks before that trial began. Due to time constraints of the 2002 electoral process, however, the three-judge court began the Texas House trial on November 12, 2001, in the absence of a DOJ ruling.[5]

Following the example of *Upham v. Seamon*, 456 U.S. 37, 38 (1982), and *Terrazas v. Clements*, 537 F.Supp. 514, 519 (N.D. Tex. 1982), the three-judge court heard evidence on the Texas House

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See, e.g., Upham v. Seamon, 456 U.S. 37, 41-43 (1982). Although the three-judge court was under an obligation not to transgress §2 in creating its plan, Appellant's specific §2 challenges were not before that court when it reached its decision.

4. Initially, the three-judge court deferred federal proceedings until October 1, 2001, to give Texas's state courts an opportunity to address redistricting concerns. *See Growe v. Emison*, 507 U.S. 25 (1993). Once it became apparent that the state courts would be unable to timely complete this task, the three-judge court proceeded with the federal trials.

5. The House trial began three weeks before December 3, 2001—the first day for candidate filing for the 2002 elections. TEX. ELEC. CODE §172.023(b). Filing was scheduled to close on January 2, 2002, a mere 51 days after the first day of trial. *Id.* §172.021(c).

districts; but it did not act until DOJ ruled.[6] Because DOJ found that the LRB plan retrogressed in violation of §5, the three-judge court fashioned its own plan to address DOJ's objections without unnecessarily disrupting the unobjected-to portions of the LRB's plan.[7] *See Upham*, 456 U.S., at 42-43.

Consequently, the three-judge court's remedial plan—not the ineffective LRB House plan—determined Texas's House districts. Appellant's §2 objections to the ineffective LRB plan were not properly at issue below, and they should not now be considered by this Court, since any pronouncement on the ineffective LRB plan would be an impermissible advisory opinion. The Court should dismiss this appeal to the extent it presents §2 challenges to the ineffective LRB plan.

B. Appellant's §2 Claims Challenge the Wrong Plan: The Three-Judge Court's Plan, Not the LRB Plan, Governs Texas's House Districts.

Although the three-judge court was required to start with the Texas House plan promulgated by the LRB as its baseline, *see Upham*, 456 U.S., at 37, 41-43, the court remediated the objected-to portions of that plan, producing a court-decreed plan for Texas's

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6. Optimally, a court would not hear evidence until after DOJ acted. Here, however, the imminence of the 2002 election process required the three-judge court to adopt this procedure if there was to be any possibility of deciding the case before the 2002 elections.

7. DOJ found that the LRB's plan (Plan 1289-H) created one new Hispanic district (District 80 in South Texas) but eliminated an existing Hispanic district (District 115 in Bexar County). In addition, DOJ identified three districts (Districts 74, 35, and 38) with Spanish-surname-registered-voter percentages of 48.7, 50.2, and 60.8, respectively, in which Latinos lost the opportunity to elect the candidate of their choice. Thus, the net effect of Plan 1289-H was a loss of three minority districts. *See* App., at 29-33.

House districts.[8] *See Wesch v. Hunt*, 785 F.Supp. 1491, 1499-1500 (S.D. Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992) (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 137 (1981)). The court's plan is the only plan currently in place, and it is therefore the only plan properly subject to challenge in this Court.[9]

Appellant, however, continues to challenge the validity of the LRB plan under §2 of the Voting Rights Act. The State maintains that the LRB plan does not violate §2. Regardless, when the three-judge court remediated that plan to correct DOJ's §5 objections, many of Appellant's concerns about specific districts were, in fact, changed in that process.[10] Therefore, Appellant's challenges to the LRB plan—rather than the three-judge court's plan—are irrelevant to this appeal from the judgment below, which should be summarily affirmed.[11]

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8. The three-judge court's plan is 1369-H, and the LRB's plan is 1289-H.

9. Essentially, Appellant attempts to appeal from language in the three-judge court's opinion—commenting that §2 does not require additional Latino districts, *see* App., at 7-8—rather than the court's judgment, which implemented a remedial House plan in place of the LRB plan. But it is the judgment—which was directed at DOJ's §5 objections, not Appellant's §2 claims—that must be the focus of this Court's review. *See Texas v. Hopwood*, 518 U.S. 1033, 1033 (1996) (Ginsburg, J., concurring in the denial of the petition for writ of certiorari) (noting that the Court "'reviews judgments, not opinions'") (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

10. *See e.g.*, App., at 9-11 (reinstating Districts 35, 74, and 115). Thus, whatever §2 complaints Appellants had about the LRB plan have no application to the court's plan—the only plan subject to this Court's review.

11. Even had Appellant challenged the court's plan, that plan passes muster under §2.

II. THE REMAINING QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THE COURT SHOULD SUMMARILY AFFIRM.

A. The Three-Judge Court Properly Limited Its Remediation to Narrowly Address DOJ's §5 Objections to the LRB Plan.

Appellant erroneously argues that the three-judge court could not use the LRB plan as its baseline because that plan was not precleared by DOJ. J.S., at 16-18. This is simply incorrect. Although DOJ objected to the LRB plan on the ground that three additional Latino districts we required to avoid retrogression under §5, the plan survived DOJ scrutiny in all other respects:

> "Beyond the specific discussion above, however, in all other respects we find that the State has satisfied the burden of proof required by §5." App., at 32-33.[12]

Despite this clear language, Appellant contends that *Lopez v. Monterrey County*, 519 U.S. 9, 21-22 (1996), supports its argument that DOJ's objection precluded implementation of any aspect of the LRB plan. Appellant is mistaken. *Monterrey County* simply establishes that when a court adopts a plan that reflects the legislative "policy choices" of the State, that plan is subject to preclearance requirements. *Id.*, at 22. *Monterrey County* does not stand for the proposition that a plan must be precleared *a second*

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12. Because the LRB plan was not precleared in its entirety, it never took effect and thus was never subject to Appellant's §2 challenge. *See supra* Part I.A. However, that does not mean the court was required to ignore the unobjected-to portions in creating a remedial plan. To the contrary, *Upham* required the court to respect the LRB's policy choices to the extent they did not violate federal law. 456 U.S., at 42-43.

time if a court uses unobjected-to portions of a legislative plan as the baseline for a judicial plan.[13]

Similarly, Appellant mistakenly contends that DOJ's objections were global and required the three-judge court to reject the LRB plan in its entirety. Again, DOJ's letter establishes that this is incorrect. After outlining specific instances of retrogression in the LRB plan, DOJ stated:

> "Because retrogression is assessed on a state-wide basis, the State may remedy this impermissible retrogression either by restoring three districts from among these problem areas, by creating three viable new majority minority districts elsewhere in the State, or by some combination of these methods." App., at 29.

The three-judge court chose to rectify this limited retrogression by "restoring three districts from among the problem areas," as well as by adding back a Latino district in Bexar County. App., at 9-11. Any "taint" from DOJ's ruling affected only those portions of the LRB plan that had, in fact, drawn an objection. *Terrazas*, 537 F.Supp., at 537. In all other respects, the "vitality of the legislative judgment embodied in those portions of the LRB plans that are not the subject of continuing Section 5 objections" required deference to the LRB's enactment. *Id.* This approach is consistent with the Court's admonition that "a district court should not preempt the

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13. The three-judge court correctly used the precleared portions of the LRB plan as its baseline, because, as this Court has made clear, a district court errs when it: fails to adopt a remedial plan that "most closely approximate[s] the state-proposed plan" rejects "state policy choices more than was necessary to meet the specific constitutional violations involved"; or "disregards aspects of the legislative plan not objected-to by the [United States] Attorney General." *Upham*, 456 U.S., at 42-43 (discussing insufficient deference paid to state plans by three-judge courts).

legislative task nor 'intrude upon state policy any more than necessary.'" *Id.*, at 528 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)); *see also Upham*, 456 U.S., at 42-43.

The three-judge court adopted a plan that was faithful to this Court's jurisprudence, as well as to federal law, the federal Constitution, and Texas state policy. Accordingly, the judgment should summarily be affirmed.

B. The Three-Judge Court's Factual Findings Satisfy Rule 52 and Are Sufficient for Proper Appellate Review.

The Court should reject Appellant's argument that the three-judge court failed to comply with Federal Rule of Civil Procedure 52. The lower court's per curiam opinion satisfies Rule 52 and permits proper appellate review by "'giv[ing] the reviewing court a clear understanding of the factual basis for the decision.'" *Folger Coffee Co. v. Olivebank*, 201 F.3d 632, 635 (CA5 2000) (quoting *Burma Navigation Corp. v. Reliant Seahorse MV*, 99 F.3d 652, 656 (CA5 1996)); *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (CA9 1985) (holding that remand was not necessary, even though findings did not articulate specific factual bases for holding, because the basis for the court's decision was clear); *see also* FED. R. CIV. P. 52(a).

Moreover, even if the Court were to decide that the findings in the per curiam opinion were somehow deficient, remand would not be necessary because "'the failure of a District Court to comply with Rule 52(a) in respect of findings of fact does not demand reversal of the correct judgment . . . if a full understanding of the issues could be reached without the aid of findings even though such findings would have been helpful.'" *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 400 (CA6 1997) (quoting *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810, 815 (CA6 1954)). Because a full understanding of the issues is easily obtained from the opinion, the Court should not reverse and remand for additional factfindings in support of the lower court's judgment.

CONCLUSION

The Court should dismiss the portion of the appeal encompassing Appellant's §2 challenges to the LRB plan and otherwise summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

Respectfully submitted,

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